ORIGINAL

(10)

No. 05 - 7142

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Timothy Williams,

Petitioner,

v.

William Overton et al.,

Respondents.

ORIGINAL

John H. Walton,

Petitioner,

v.

Barbara Bouchard et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 14, 2005

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SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, Petitioners Timothy Walton and John H. Walton submit this supplemental brief in support of their October 17, 2005, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. *See* Sup. Ct. R. 15.8 ("Any party may file a supplemental brief at any time while a petition for certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."); *see also* Robert L. Stern et al., SUPREME COURT PRACTICE § 6.39, at 463-64 (8th ed. 2002).

As explained in the petition, the federal courts of appeals are intractably and increasingly split over the second question presented:

> Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

Pet. at i.

On November 1, 2005 – almost three weeks after the petition was filed – the Ninth Circuit published its decision in *Lira v. Herrera*, No. 02-16325, — F.3d —, 2005 WL 2850115 (CA9 Nov. 1, 2005), which bears directly on this question and widens the split among the circuits. Prior to *Lira*, the Ninth Circuit had not taken a position on whether the PLRA requires dismissal of a "mixed" PLRA complaint in its entirety, and as noted in the petition, the district courts within the Ninth Circuit were sharply divided. Pet. at 21-22 (cataloguing disagreement among district courts within the Ninth Circuit).

In *Lira*, the Ninth Circuit rejected the total exhaustion rule[1] first articulated by the Tenth Circuit in *Ross v. City of Bernalillo*, 365 F.3d 1181, 1182 (CA10 2004), adopted by the Sixth Circuit in *Jones Bey v. Johnson*, 407 F.3d 801, 809 (CA6 2005) – the prior Sixth Circuit precedent on which the court below relied in this case – and practiced by the Third Circuit in *Vazquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005). It then expressly "agree[d], with some caveats, that the Second Circuit's approach [in *Ortiz v. McBride*, 380 F.3d 649, 651 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005),] is appropriate." *Lira*, 2005 WL 2850115 at *5. In doing so, it also aligned itself with the three additional circuits – the Fifth, Seventh, and Eighth Circuits – that practice partial exhaustion. *See Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004) (dismissing only unexhausted claims from a mixed PLRA complaint); *Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim for failure to exhaust but remanding for determination of whether other claim was exhausted); *Kozohorsky v. Harman*, 332 F.3d 1141, 1144 (CA8 2003) (requiring district courts to allow PLRA plaintiffs to amend their complaints to delete any unexhausted claims).

As *Lira* and the split that it widens illustrate, clarification of the meaning of the PLRA's exhaustion requirement is of substantial public importance. And, as a coalition of twenty-two states – including the State of Michigan – and the District of Columbia recently acknowledged in another PLRA exhaustion case, "the substantial public importance of clarifying the meaning of the PLRA's exhaustion requirement" "makes this petition cert-worthy." Brief of the States

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[1] Rather than employ the term "total exhaustion" as used by every other case presenting this issue and as used throughout the petition, *Lira* "use[s] the term 'total exhaustion dismissal.'" 2005 WL 2850115. The distinction is purely semantic.

of New York et al. as *Amici Curiae*, *Woodford v. Ngo*, No. 05-416, at 3-4.[2]

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2005

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[2] At issue in *Ngo* is whether "a prisoner satisf[ies] the Prison Reform Litigation Act's administrative-exhaustion requirement by filing an untimely or procedurally defective administrative appeal." Petition for Certiorari, *Woodford v.Ngo*, No. 05-416, at i. The same issue is also presented in *Johnson v. Meadows*, 418 F.3d 1152 (CA11 2005), *pet. for cert. filed* Sep. 8, 2005 (No. 05-6336), and *Feuer v. McCollum*, 139 Fed. Appx. 928 (CA10 2005), *pet. for cert. filed* Nov. 10, 2005 (not yet docketed).

While as important and as worthy of this Court's consideration, the question presented in *Ngo*, *Johnson*, and *Feuer*, will not resolve the issues presented in this case.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2005

No. 05-7142

TIMOTHY WILLIAMS, PETITIONER

v.

WILLIAM OVERTON ET AL., RESPONDENTS

JOHN H. WALTON, PETITIONER

v.

BARBARA BOUCHARD ET AL., RESPONDENTS

CERTIFICATE OF SERVICE

I, Jean-Claude André, a member of the Bar of this Court, hereby certify that on November 14, 2005, as required by Supreme Court Rule 29, the enclosed SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI was served by first-class mail, postage prepaid, on counsel for Respondents:

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I further certify that all parties required to be served have been served.

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November 14, 2005

Clerk of Court
Supreme Court of the United States
Washington, D.C. 20543

Re: *Jones v. Bock*, No. 05-7058
Williams v. Overton, No. 05-7142

Dear Clerk of Court:

Pursuant to Supreme Court Rule 15.8, please file the enclosed two documents:

(1) Supplemental Brief in Support of Petition for Certiorari, *Jones v. Bock*, No. 05-7058

(2) Supplemental Brief in Support of Petition for Certiorari, *Williams v. Overton*, No. 05-7142

Per the Court's rules, I have enclosed originals and ten copies of each document. Detached Certificates of Service are also enclosed.

If there are any problems with the form of these documents, please contact me at our Los Angeles office, the contact information for which is located in the upper right-hand corner of this letterhead.

Thank you for your assistance.

Very truly yours,

Jean-Claude André

Enclosures

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Nos. 05-7058 and 05-7142

IN THE

Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

—v.—

BARBARA BOCK, *et al.*,

Respondents.

(caption continued on inside front cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF MICHIGAN, THE LEGAL AID SOCIETY, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, PRISON LEGAL NEWS, PRISON LEGAL SERVICES, PRISON AND CORRECTIONS SECTION OF THE MICHIGAN STATE BAR, OHIO JUSTICE & POLICY CENTER AND THE UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONERS

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